UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	
This Document Relates To:	§	Civil Action No. H-01-3624
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	And Consolidated Cases
Plaintiffs,	§	
vs.	§	
ENRON CORP., et al.	§	
Defendants.	§	

DEFENDANT CREDIT SUISSE FIRST BOSTON CORPORATION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED COMPLAINT

925

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules and Statutes

Other Sources

Defendant Credit Suisse First Boston Corporation ("CSFB") submits this reply memorandum in further support of its motion to dismiss Plaintiffs' Consolidated Complaint ("Complaint").

Preliminary Statement

In our opening memorandum, we demonstrated that Plaintiffs' claims against CSFB should be dismissed for four independent reasons: first, Plaintiffs' Complaint fails to satisfy the express requirements of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act ("PSLRA"); second, Plaintiffs' claims are time-barred to the extent they are premised on CSFB's statements or conduct prior to April 8, 1999; third, Plaintiffs' timely claims fail to state a viable cause of action under Section 10(b) of the Securities Exchange Act of 1934; and fourth, the Complaint fails to allege any facts to hold CSFB liable as a control person.

Plaintiffs' responses to each are without merit. Plaintiffs concede that certain of their claims are time-barred (Opp. at 44),[1] and simply never respond to CSFB's arguments on control person liability. Plaintiffs thus are left with their claim under Section 10(b) that CSFB is liable for its alleged participation in Enron's fraudulent scheme and for statements by CSFB analysts who are not alleged to have acted with any particularized scienter. The allegations upon which Plaintiffs rely do not state a viable cause of action under Section 10(b) as a matter of law. To the contrary, Plaintiffs' arguments--which ignore and distort the law--are unavailing. Existing law simply does not permit Plaintiffs to target "deep pocket defendants" to ensure a "significant recovery" simply because the issuer is bankrupt and its auditor is "financially impecunious". (Opp. at 42.) Plaintiffs

---

[1] Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss by Credit Suisse First Boston Corporation, dated June 10, 2002, is cited herein as "Opp. at __". CSFB's opening memorandum, Defendant Credit Suisse First Boston's Memorandum of Law in Support of its Motion to Dismiss Plaintiffs' Consolidated Complaint, dated May 8, 2002, is cited herein as "CSFB Mem. at __".

acknowledge as much by effectively threatening that dismissal of the claims against CSFB will force Congress to overrule this Court's decision by legislation. (Opp. at 42-43.) In fact, new law is exactly what Plaintiffs would need to sustain their claims against CSFB: to hold CSFB liable would require the Court to ignore controlling Supreme Court and Fifth Circuit precedent and the PSLRA.

Argument

I. PLAINTIFFS' COMPLAINT FAILS TO SATISFY THE PLEADING REQUIREMENTS OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE PSLRA.

As explained in our opening memorandum, Plaintiffs' allegations do not comply with the pleading requirements of Rules 8 and 9(b) of the Federal Rules of Civil Procedure or the PSLRA. (CSFB Mem. at 5-7.) Plaintiffs' response to those arguments is half-hearted and wrong. Plaintiffs contend that puzzle pleading has been "repeatedly rejected by courts" (Opp. at 2), but they cite only two cases--neither of which saves the 500-page labyrinth that Plaintiffs have filed here. For example, in In re Landry's Seafood Restaurant, Inc. Securities Litigation, Civ. No. H-99-1948 (S.D. Tex. Feb. 20, 2001), it does not appear that the complaint--which was a mere 73 pages--was ever challenged under puzzle pleading. And in In re Honeywell International Inc. Securities Litigation, 182 F. Supp. 2d 414, 416 (D.N.J. 2002), the complaint was only 97 pages long and, unlike here, was "readily" discernable. Notably, Plaintiffs chose not to address the numerous cases--including Fifth Circuit law--in which complaints far less burdensome than Plaintiffs' have been dismissed for the "'unwelcome and wholly unnecessary strain'" they place "'on defendants and the court system'". In re Splash Tech. Holdings, Inc. Sec. Litig., 160 F. Supp. 2d 1059, 1073-75 (N.D. Cal. 2001) (dismissing 124-page complaint under Rules 8 and 9(b)) (quoting In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1544 (9th Cir. 1994)). Accord, e.g., Williams v. WMX Techs., Inc., 112 F.3d 175, 178-80 (5th Cir.

1997) (dismissing complaint which "although long, states little with particularity" and observing that "such a garrulous style is not an uncommon mask for an absence of detail"); Wenger v. Lumisys, Inc., 2 F. Supp. 2d 1231, 1243-44 (N.D. Cal. 1998) (dismissing complaint and observing that the "demands of reviewing such a complaint abuse judicial resources"); Silver v. Queen's Hosp., 53 F.R.D. 223, 224-26 (D. Hawaii 1971) (striking complaint and stating that "neither the Court nor opposing counsel should be required to expend time and effort searching through large masses of conclusory, argumentative, evidentiary and other extraneous allegations in order to discover whether the essentials of claims asserted can be found in such a melange. It is the duty and responsibility, especially of experienced counsel, to state those essentials in short, plain and nonredundant allegations"). (See also CSFB Mem. at 5-7 & n.3.)

Moreover, Plaintiffs' opposition--which is itself an extraordinary 121 pages--exacerbates their pleading deficiencies. Plaintiffs now rely on "facts" not alleged in the Complaint, including "facts" lifted from newspaper articles that post-date the Complaint. (See, e.g., Opp. at 1 n.2 (recent New York Times article regarding the "Enron debacle"), 2 n.3 (recent Business Week article purporting to demonstrate "recent revelations of corruption on Wall Street"), 32 (new chart purporting to show CSFB involvement); 46 n.27 (recent Miami Herald article regarding the relationship between banks and Enron); 54 n.29 (additional unpleaded "facts" relating to the funding of the LJM2 partnership); 104 (contending that CSFB "put[] up $750,000 before LJM2 was fully formed or funded, much more money than their allocated share of LJM2's equity was or would have been" despite the fact that the Complaint contains no such allegation), 118 (recent New York Times article regarding Andersen).) Those new "allegations" may not be considered on a motion to dismiss, see Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984) ("[I]t is axiomatic that the complaint may not be amended by the briefs in

opposition to a motion to dismiss."), and, in any event, do not cure the pleading deficiencies.[2]

Nor does merely repeating the existing allegations in the Complaint cure the deficiencies. (See, e.g., Opp. at 3-28, 79-94.) Many of the allegations Plaintiffs repeat either have nothing to do with CSFB (see Opp. at 4 (discussing allegations against defendant Barclay's), 108 (discussing allegations against CIBC)), or are non-particular allegations against "Enron's banks" to which Plaintiffs have now added the phrase "--including CS First Boston--" in an effort to feign particularity (id. at 5). Like the Complaint, Plaintiffs' oppositions with respect to the other bank defendants are nearly (and at times, exactly) identical.

In short, Plaintiffs' opposition does nothing to cure the pleading infirmities in the Complaint. To the contrary, it only mirrors them.

II. PLAINTIFFS CONCEDE THAT CLAIMS BASED ON CSFB'S ALLEGED STATEMENTS AND CONDUCT PRIOR TO APRIL 8, 1999, ARE TIME-BARRED.

Plaintiffs concede that they are barred from recovering damages for conduct or statements outside the three-year statute of limitations and that, accordingly, their Section 10(b) claims based on statements and conduct prior to April 8, 1999, are time-barred.[3]

---

[2] The Court should similarly disregard the unpleaded, dramatic embellishments to the allegations contained in Plaintiffs' opposition. Compare, e.g., Compl. ¶ 712 (senior executives of CSFB "invested $22.5 million in equity money" and "put their money up early in 12/99 so LJM2 would have the cash to fund four SPEs to do deals with Enron prior to year-end 99") with Opp. at 94 (CSFB's "top executives had secretly pre-funded LJM2 in 12/99 to permit the illicit 99 year-end deals").

[3] Notwithstanding their concession that "the three-year statute of repose for 1934 Act claims bars plaintiffs from pursuing damages against it for any time period prior to 4/8/99" (Opp. at 43), Plaintiffs nevertheless assert that CSFB is liable for "making false statements to the market regarding Enron" in the Registration Statements for two pre-April 8, 1999 offerings: (i) a "11/98" offering of $250 million of 6.95% Enron notes, and (ii) a "2/99" offering of 27.6 million shares of Enron common stock. (Opp. at 30, 35-38, 50, 61, 78, 95-96, 99). That is wrong. Because those Registration Statements were issued prior to April 8, 1999, they cannot form the basis of any Section 10(b) claims

(Opp. at 44.) See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 (1991) (private right of action under Section 10(b) "must be commenced within one year after discovery of the facts constituting the violation and within three years after such violation"). Having made that concession, Plaintiffs argue, nonetheless, that time-barred offerings may be "admissible at trial" to establish the alleged scheme. (Opp. at 44 & n.25.) That is irrelevant at this stage of the litigation.[4] The only issue on a motion to dismiss is whether Plaintiffs have stated a claim. They have not.

III. PLAINTIFFS HAVE FAILED TO STATE A SECTION 10(b) CLAIM AGAINST CSFB.

In our opening memorandum, we demonstrated that Plaintiffs have no basis for holding CSFB primarily liable under Section 10(b). (CSFB Mem. at 9-21.) Having neither facts nor law to turn to in response, Plaintiffs instead have put forward novel theories of liability that do not comport with existing authority and that are in fact inconsistent with the provisions and purposes of the PSLRA.

A. The Complaint Fails to Allege Any Actionable Statements or Conduct by CSFB.

Plaintiffs' allegations against CSFB establish only that CSFB performed routine investment banking services for Enron. That, of course, does not give rise to Section 10(b) liability. Alleging that CSFB provided such services--and characterizing those services as a "scheme to defraud"--does not change that result.

Faced with this pleading deficiency, Plaintiffs have chosen to distort the controlling authority and in doing so would have this Court adopt a theory of

---

against CSFB. (See infra Part III.A.2.)

[4] Plaintiffs cite no support (and we are aware of none) for their blanket assertion that "allegations regarding actions taken beyond the statute of limitations [should] be considered at the pleading stage". (Opp. at 44 n.25.) Nor do they cite any cases (again, we are aware of none) where a Court relied upon statements from time-barred offerings to hold that a defendant may be held primarily liable under Section 10(b). (Id. at 44-45.)

Section 10(b) liability whereby a non-culpable defendant may be found liable for the statements and acts of all other defendants simply by Plaintiffs labeling their allegations a "scheme to defraud". (Opp. at 100-02.) As discussed below, that theory finds no support in the controlling law.

1. Applicable legal standards.

Section 10(b) makes it "unlawful for any person, directly or indirectly" to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe . . . ." 78 U.S.C. § 78j. See also Central Bank v. First Interstate Bank, 511 U.S. 164, 173 (1994) ("In § 10(b), Congress prohibited manipulative or deceptive acts in connection with the purchase or sale of securities."). Rule 10b-5, promulgated by the SEC, similarly provides:

> "It shall be unlawful for any person, directly or indirectly . . .
> (a) To employ any device, scheme or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate a fraud or deceit upon any person
> . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

In defining the scope of Section 10(b) liability, the Supreme Court and the Fifth Circuit have observed that 10b-5 actions fall analytically into two categories: (1) fraud accomplished primarily through affirmative misrepresentations (i.e., 10b-5(b)), or (2) fraud accomplished through the nondisclosure of deceptive conduct (i.e., 10b-5(a) and (c)). See Central Bank, 511 U.S. at 173-74; Smith v. Ayres, 845 F.2d 1360, 1363 (5th Cir. 1988); Finkel v. Docutel/Olivetti Corp., 817 F.2d 356, 359-60 (5th Cir. 1987). In 1994, the Supreme Court narrowed the scope of Section 10(b) liability in Central Bank v.

First Interstate Bank, 511 U.S. 164 (1994).[5] That Plaintiffs recognize the limitations imposed by Central Bank is clear from the extent to which they distort its holding in an attempt to avoid it. We set forth below the holding of Central Bank and its impact on the two categories of primary liability under Section 10(b).

a. The *Central Bank* decision.

In Central Bank v. First Interstate Bank, the Supreme Court considered whether aiding and abetting a violation of Section 10(b) itself constituted a primary violation under the 1934 Act. Observing that aiding and abetting "reaches persons who do not engage in the proscribed activities at all, but rather who give a degree of aid to those who do", the Court held that Section 10(b) "does not itself reach those who aid and abet . . . [but] prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act". Id. at 177. Because Congress intended that only primary actors be liable under Section 10(b), secondary actors, such as a bank, can be liable only when the bank itself "employs a manipulative device or makes a material misstatement or omission on which a purchaser or seller of securities relies".[6] Id. at 191.

Thus, after Central Bank, the relevant inquiry is whether the allegations against a particular defendant constitute primary or secondary liability. See Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1230 (10th Cir. 1996) ("Prior to Central Bank of Denver the

---

[5] See In re Kendall Square Resource Corp. Sec. Litig., 868 F. Supp. 26, 28 (D. Mass. 1994) ("The Supreme Court's decision in Central Bank makes clear that the policy undergirding it is to constrict the ambit of private actions under Section 10(b) and to thereby reduce the number of parties implicated by that statute.").

One year later, in 1995, Congress narrowed the reach of the securities laws even further through the passage of the PSLRA. See H.R. Rep. No. 104-369, at 32 (Reform Act passed to deter "abusive" and "frivolous" securities litigation and to protect defendants "who may be sued for non-knowing securities laws violations from liability for damage actually caused by others").

[6] In limiting the scope of liability, the Court was concerned, among other things, that more expansive liability would deter professionals, such as banks, from providing routine market advice for fear "that business failure would generate securities litigation against the professional". Central Bank, 511 U.S. at 189.

distinction was academic. Now it is pivotal."). Allegations that "sound to the court like aiding and abetting" are not cognizable under Section 10(b). Zishka v. Am. Pad & Paper Co., No. 3:98-CV-0660-M, 2000 WL 1310529, at *5 (N.D. Tex. Sept. 13, 2000) (dismissing Section 10(b) claims); see also In re Kendall, 868 F. Supp. at 28 (dismissing claims based on conduct which "at most . . . constitutes aiding and abetting"); Vosgerichian v. Commodore Int'l, 862 F. Supp. 1371, 1378 (E.D. Pa. 1994) (allegations that "do not go beyond" alleging that one defendant "assisted" another in "perpetrating securities fraud" are "not cognizable").

Nor are allegations that a defendant engaged in a conspiracy to engage in a fraudulent scheme cognizable under Section 10(b).[7] See, e.g., Primavera Familienstiftung v. Askin, No. 95 Civ. 8905 (RWS), 1996 WL 494904, at *7 (S.D.N.Y. Aug. 30, 1996) ("The reasoning of [Central Bank] also forecloses secondary civil liability based on an alleged conspiracy to violate the securities laws."); In re Ross Sys. Sec. Litig., No. C-94-0017-DLJ, 1994 WL 583114, at *5 (N.D. Cal. July 21, 1994) ("It is beyond logic to maintain that although Central Bank prohibits aiding and abetting liability it permits plaintiffs to maintain the same cause of action by labeling it as a conspiracy."); In re Syntex Corp. Sec. Litig., 855 F. Supp. 1086, 1098 (N.D. Cal. 1994) (same). "[W]here the requirements for primary liability are not independently met, they may not be satisfied based solely on one's participation in a conspiracy in which other parties have committed a primary violation." Dinsmore v. Squadron, Ellenoff, Plesent, Scheifeld & Sorkin, 135 F.3d 837, 842-43 (2d Cir. 1998) (holding that a defendant can be liable only for its own

[7] In dissenting to the Central Bank decision, Justice Stevens noted that "[t]he Court's rationale would sweep away the decisions recognizing that a defendant may be found liable in a private action for conspiring to violate § 10(b) and Rule 10b-5." 511 U.S. at 200 n.12.

misrepresentation, not the misrepresentations of other alleged co-conspirators in the scheme).[8]

b. Liability based on misrepresentations under Rule 10b-5(b) after *Central Bank.*

To be liable under Rule 10b-5(b), "'a defendant must actually make a false or misleading statement'" and the statement must be "attributed to that specific actor at the time of public dissemination". Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir. 1998) (quoting Shapiro v. Cantor, 123 F.3d 717, 720 (2d Cir. 1997)). Accord Ziemba v. Cascade Int'l, 256 F.3d 1194, 1205 (11th Cir. 2001); Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1225 (10th Cir. 1996); In re JWP Inc. Sec. Litig., 928 F. Supp. 1239, 1256 (S.D.N.Y. 1996); In re Kendall, 868 F. Supp. 26, 28 (D. Mass. 1994). "'Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).'" Wright, 152 F.3d at 175 (quoting Shapiro, 123 F.3d at 720); see also Anixter, 77 F.3d at 1225 ("The critical element separating primary from aiding and abetting violations is the existence of a representation, either by statement or omission, made by the defendant, that is relied upon

---

[8] Accordingly, contrary to Plaintiffs' assertion, Defendants are not liable under Section 10(b) "for the damages caused by all of the acts taken by the participants in the scheme in furtherance of the fraud." (Opp. at 101.) Such liability would directly contravene Central Bank and the PSLRA, both of which require that a plaintiff "make out a claim for primary liability against each defendant individually". See Scone Invs., L.P. v. Am. Third Mkt. Corp., No. 97 Civ. 3802, 1998 WL 205338, at *6 (S.D.N.Y. Apr. 28, 1998); see also 15 U.S.C. § 78u-4(b). Moreover, Plaintiffs' "conspiracy theory" of damages contravenes the PSLRA, which expressly limits and allocates a defendant's damages in proportion to its culpability. See 15 U.S.C. § 78-4(g)(2)(B) (making defendants "liable solely for the portion of the judgment that corresponds to the percentage of responsibility"); see also H.R. Rep. No. 104-369, at 32 (Reform Act passed to protect defendants from liability for "damage actually caused by others"). Thus, Plaintiffs' attempt to read the law of conspiracy into Section 10(b) fails as a matter of law. (Opp. at 100-02 & nn.51-52 (citing conspiracy and federal mail fraud cases).) SEC v. National Bankers Life Ins. Co., 324 F. Supp. 189, 194-95 (N.D. Tex. 1971), decided more than 20 years prior to Central Bank, does not require a different result. In that case, the "scheme" liability was premised on aiding and abetting and conspiracy--forms of liability that are no longer viable after Central Bank. Id. at 195.

by the plaintiff."). Thus, under this "bright line" test--which has been adopted by numerous courts, including the Second, Tenth and Eleventh Circuits--"a secondary actor cannot incur primary liability" for a statement made by others. Wright, 152 F.3d at 175. The "bright line" test is consistent with the particularity requirements of the PSLRA and Rule 9(b). See 15 U.S.C. § 78u-4(b); Williams, 112 F.3d at 177 (5th Cir. 1997).

Some courts (primarily in the Ninth Circuit and including nearly all of those relied upon by Plaintiffs on this issue) have alternatively adopted the "substantial participation" test under which a defendant may be liable for statements made by others in which the defendant had significant involvement in drafting or approving. See, e.g., In re Software Toolworks Inc., 50 F.3d 615, 628 n.3 (9th Cir. 1994) (accountant may be primarily liable for its "significant role in drafting and editing" statements of the issuer).[9] Even under this test, however, mere participation in a scheme to issue false statements is not enough; rather, a defendant is liable only if it had direct involvement in making the alleged misstatements or omissions. See, e.g., Murphy v. Hollywood Entm't Corp., No. CIV. 95-1926-MA, 1996 WL 393662, at *6 n.10 (D. Or. May 9, 1996) ("[M]ere participation in a 'scheme' that includes the issuance of false financial statements . . . would fail under Central Bank. Plaintiffs must prove . . .that the underwriters were direct, knowing participants in the drafting of documents which included material misstatements and/or omissions."). Moreover, to the extent the "substantial participation" test imposes primary liability on the basis of mere assistance, it "would effectively revive aiding and abetting liability under a different name, and would therefore run afoul of the Supreme Court's holding in Central Bank." Wright, 152 F.3d at 175 (rejecting "substantial participation"

---

[9] See also In re ZZZZ Best Sec. Litig., 864 F. Supp. 960, 970 (C.D. Cal. 1994) (accounting firm may be liable for being "intricately involved" in the drafting of false documents); Adam v. Silicon Valley Bancshares, et al., 884 F. Supp. 1398, 1401 (N.D. Cal. 1995) (holding accountant liable for financial statements it helped to prepare); In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig., 676 F. Supp. 458, 468-69 (S.D.N.Y. 1987) (requiring "direct participation in a misrepresentation").

test) (internal quotations omitted). Accord Anixter, 77 F.3d at 1226 n.10 (to the extent courts "reformulate the 'substantial assistance' element of aiding and abetting liability into primary liability, they do not comport with Central Bank"); In re JWP, 928 F. Supp. at 1256 (same). As discussed below, Plaintiffs fail to state a claim under either the "bright line" or "substantial participation" test. (See infra Part III.A.2.)

c. Liability based on conduct under Rule 10b-5(a) & (c) after *Central Bank.*

In the absence of an affirmative misrepresentation (which is the case here), a defendant may be liable for undisclosed deceptive conduct under Rule 10b-5(a) or (c). However, "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." Central Bank, 511 U.S. at 174; Chiarella v. United States, 445 U.S. 222, 228 (1980).[10] A duty to disclose "arises from the relationship between parties . . . and not merely from one's ability to acquire information because of his position in the market." Chiarella, 445 U.S. at 232 n.14.

Moreover, in order for conduct to be actionable under Section 10(b), the conduct committed by each defendant must itself be deceptive. See Sante Fe Indus., Inc. v. Green, 430 U.S. 462, 473-74 (1977) ("The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception."); Central Bank, 511 U.S. at 174 ("We cannot amend the statute to create liability for acts that are not

---

[10] Thus, although "[a] defendant need not have made a false or misleading statement to be liable" (Opp. at 36), the "conduct" cases relied upon by Plaintiffs involve a defendant who has a fiduciary relationship that creates a duty to disclose. See, e.g., United States v. O'Hagan, 521 U.S. 642, 652 (1997) (trading on information obtained in fiduciary relationship constitutes a deceptive device); SEC v. Zandford, 122 S.Ct. 1899, 1903-05 (2002) (finding that a "broker who has a fiduciary duty to her clients" violates Section 10(b) by taking client funds without authorization); Affiliated Ute Citizens v. United States, 406 U.S. 128, 153 (1972) (extending liability to a bank which had "an affirmative duty . . . to disclose" its conduct because of its fiduciary relationship to the stockholders); Superintendent of Ins. v. Bankers Life and Casualty Co., 404 U.S. 6, 11-12 (1971) (finding that deceptive practices by a controlling stockholder who "owes the corporation a fiduciary obligation" states a claim under Section 10(b)).

themselves manipulative or deceptive.").[11] "Primary liability does not attach when the alleged fraudulent conduct is no more than the performance of a routine market function." Scone Invs., L.P. v. Am. Third Mkt. Corp., No. 97 Civ. 3802, 1998 WL 205338, at *8 (S.D.N.Y. Apr. 28, 1998); accord Bane v. Signundr Exploration Corp., 848 F.2d 579, 582 (5th Cir. 1988) (no liability where bank merely engaged in a "routine or typical banking practices"); Jett v. Sunderman, 840 F.2d 1487, 1493 (9th Cir. 1988) (bank does not violate Section 10(b) by engaging in "routine commercial financing transaction").

Finally, asserting claims based on deceptive conduct "does not excuse plaintiffs from proving all of the established elements of a 10b-5 claim, even when proceeding under Rule 10b-5(a) and (c) rather than Rule 10b-5(b)." In re Towers Fin. Corp. Noteholders Litig., No. 93 Civ. 0810 (WK) (AJP), 1995 WL 571888, at *16 (S.D.N.Y. Sept. 20, 1995); see also Lemmer v. Nu-Kote Holding, Inc., No. Civ. A. 398CV0161L, 2001 WL 1112577, at *8 (N.D. Tex. Sept. 6, 2001). "Although subsections (a) and (c) do not explicitly require misstatements or omission, the schemes and practices prohibited by 10b-5 are necessarily those of a fraudulent nature. In other words, just as with common-law fraud claims, 10b-5 claims must allege either (1) material misstatements or (2) material omissions by a person having a duty to disclose." In re Lake States Commodities, Inc., 936 F. Supp. 1461, 1472 (N.D. Ill. 1996).[12] To hold otherwise would

---

[11] The SEC's amicus briefs submitted in United States v. O'Hagan, 521 U.S. 642 (1997), and United States v. Bryan, 58 F.3d 933 (4th Cir. 1995), support the proposition that conduct, in order to be actionable under Section 10(b), must be deceptive. (See SEC Amicus Brief submitted in O'Hagan at 19 (arguing that Section 10(b) "by definition, requires deception"); SEC Amicus Brief submitted in Bryan at 7 ("The misappropriation theory does require deceptive conduct.").)

[12] Accord Stack v. Lobo, 903 F. Supp. 1361, 1374 (N.D. Cal. 1995) (dismissing Section 10(b) claims based on a "scheme to defraud"); see also In re Valence Tech. Sec. Litig., No. C 95-20459 JW, 1996 WL 37788, at *10-11 (N.D. Cal. Jan. 23, 1996) (same); SEC v. U.S. Envtl., Inc., 897 F. Supp. 117, 120 (S.D.N.Y. 1995) ("The defendant's 'personal involvement in a scheme or plan' to violate the Securities Acts, without more, is insufficient."); Continental Cas. Co. v. State of New York Mortgage Agency, No. 94 C 1463, 1994 WL 532271, at *2-3 (N.D. Ill. Sept. 26, 1994) (rejecting allegations of a

permit liability solely on allegations of "'participation' in a scheme to defraud" which would "stretch 10b-5 beyond its text and accompanying case law". Id. at 1471-72. (See also CSFB Mem. at 11-12 .)

* * *

Applying these standards to the allegations against CSFB makes clear that CSFB cannot be liable as a primary violator under Section 10(b).

2. The Complaint fails to allege any actionable misstatements or omissions by CSFB.

The crux of the Complaint is that Plaintiffs were misled by a litany of misstatements and omissions of material fact relating to Enron's financial health and contained primarily in Enron's financial statements. (E.g., Compl. ¶¶ 121-393, 418-641.) With respect to CSFB, Plaintiffs allege (throughout the Complaint and in their opposition) that CSFB "made false and misleading statements in three SEC filed Registration Statements covering the sale of Enron or Enron-related securities and in 18 analyst reports on Enron". (Opp. at 30, 37, 50.) In fact, CSFB cannot be liable for any of those statements.

First, CSFB cannot be liable for the "three SEC filed Registration Statements covering the sale of Enron or Enron-related securities" identified by Plaintiffs: (1) the Registration Statement for an "11/98" offering of 6.95% Enron notes, (2) the Registration Statement for a "2/99" offering of 27.6 million shares of Enron common stock, and (3) the Registration Statement for the "10/00" NewPower initial public offering.[13] (Opp.

"device, scheme and artifice" to defraud where plaintiff failed to allege a misrepresentation or deception).

[13] Plaintiffs have apparently abandoned their allegation that CSFB is liable for statements made in "the resale of the Enron zero coupon convertible notes on and after 7/18/01". (Compl. ¶¶ 696, 703). As explained in CSFB's opening memorandum, CSFB cannot be liable for the "7/01" offering since CSFB did not underwrite that offering, but was merely one of 48 entities identified as "selling securityholders". (CSFB Mem. at 8 & Ex. A at 44.)

at 50; see also Compl. ¶ 703.) As discussed above and in our opening memorandum, any statements made in connection with the 11/98 and 2/99 offerings are not actionable because--as Plaintiffs concede--those offerings are outside the three-year statute of limitations. (See supra Part II; CSFB Mem. at 7-9.) Nor are statements made in connection with the "10/00" NewPower offering actionable because Plaintiffs are a purported class of Enron shareholders--not NewPower shareholders--and therefore do not have standing to bring claims for alleged statements made to sell NewPower stock. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975) (holding that only actual purchasers or sellers of the securities at issue have standing to bring claims under Section 10(b)).

Second, the statements made by CSFB analysts (Opp. at 50; Compl. ¶ 704) are not actionable because they constitute mere statements of optimism or opinion that are "too vague to be materially misleading as a matter of law". Strassman v. Fresh Choice, Inc., No. C-95-20017 RPA, 1995 WL 742728, at *11-12, *16 (N.D. Cal. Dec. 7, 1995) (dismissing Section 10(b) claims against bank based on statements by its analysts); see also Kurtzman v. Compaq Computer Corp., Civ. A. No. H-99-779, slip op. at 52 (S.D. Tex. Mar. 30, 2002) (Harmon, J.) ("Vague optimistic statements are not actionable because reasonable investors do not rely on them in making investment decisions.") (citation omitted). Moreover, Plaintiffs have not met the PSLRA's heightened pleading requirements for such forward-looking statements. See 15 U.S.C. §§ 78u-5(c)(1)(B)(i)-(ii) (requiring proof that forward-looking statements were made with "actual knowledge" of their false or misleading nature). [14] (CSFB Mem. at 21 n.10.) Notably, Plaintiffs make no argument and cite no law to the contrary. Instead, their only response to both points is

[14] Even if the statements themselves were actionable, CSFB still could not be liable because, as shown below and in CSFB's opening memorandum, Plaintiffs have failed to plead that each analyst acted with the requisite scienter at the time he or she made each statement. (See infra Part III.B.2; CSFB Mem. at 17-20.)

the unsupported--and incorrect--assertion that "[n]either is true".[15] (Opp. at 78.)

Thus, Plaintiffs have failed to allege that CSFB made or participated in making any actionable statements. Nor have Plaintiffs alleged that CSFB had significant involvement in drafting or approving any statements made by Enron in Enron's financial statements which Plaintiffs allege were false or misleading. Accordingly, Plaintiffs' allegations fail under either the "bright line" or the "substantial participation" test for Rule 10b-5(b). See Wright, 152 F.3d at 175-76 (refusing to find Section 10(b) liability under either test where the defendant "neither directly nor indirectly communicated misrepresentations to investors" and had only a "clearly tangential role in the alleged fraud" akin to "aiding and abetting"); Askin, 1996 WL 494904, at *7 ("[S]ince the Complaint is, regardless of how it is framed, one of misrepresentation, [defendants] could not have committed a primary violation of Rule 10b-5 because they are not alleged to have consciously deceived [the investors].").

3. The Complaint fails to allege any actionable conduct by CSFB.

Plaintiffs' allegations that CSFB "engaged and participated in [Enron's] fraudulent scheme and course of business" through its "extensive and very close relationship with Enron" likewise fail to state a claim under Section 10(b). (Opp. at 30, 45-46; Compl. ¶¶ 693-94.) Stripped of the conclusory "fraudulent scheme" allegations, the Complaint alleges nothing more than a routine commercial relationship between an investment bank and one of its clients. Plaintiffs allege, for example, that:

---

[15] Moreover, Plaintiffs cannot state a claim against CSFB for alleged omissions in analyst reports. See In re Valence, 1996 WL 37788, at *9 ("Plaintiffs contend that because [the defendants] chose to speak to the investment community through their analysts' reports, that they accepted a duty to disclose materially adverse facts. Plaintiffs do not cite any competent authority to support this contention. Accordingly, the Court hereby dismissed these allegations with prejudice.") Notably, Plaintiffs fail to cite any authority in support of their allegation. (Opp. at 56 n.30 & 94-95.)

- CSFB "acted as an underwriter" (Compl. ¶¶ 696-99);
- CSFB "acted as advisor to Enron on the sale of Portland General" and "advised Enron on several other merger and acquisition transactions" (id. ¶ 700);
- CSFB "helped Enron structure and finance" Enron's SPEs and partnerships, including an SPE called LJM2 (id. ¶¶ 694, 709, 712);
- CSFB "lent Enron money using trades in derivatives" (id. ¶ 706);
- CSFB "was one of the principal commercial lending banks to Enron, loaning or helping to syndicate over $4 billion in bank loans to Enron" (id. ¶ 701);
- CSFB "receiv[ed] huge fees and interest payments for those loans and syndication services" (id. ¶ 702);
- CSFB "invested $22.5 million in equity money" in certain Enron partnerships (id. ¶ 712); and
- CSFB "issued analysts' reports on Enron" (id. ¶ 704).

Thus, Plaintiffs seek to hold CSFB liable for simply doing what investment banks do. This conduct alone--and Plaintiffs allege nothing more--is not actionable under Section 10(b) as a matter of law. See Santa Fe, 430 U.S. at 474-77 (no liability if underlying conduct itself is not deceptive); Scone Invs., 1998 WL 205338, at *8 ("routine functioning of a lending institution" insufficient to state a claim under Section 10(b)); Bane, 848 F.2d at 582 (same); Jett, 840 F.2d at 1493 (same); Vosgerichian, 862 F. Supp. at 1378 (allegations that a defendant "advised" the entity that made an allegedly fraudulent statement are insufficient to state a claim under Section 10(b)).

Alleging that CSFB "was an active . . . participant in that fraud" through its lending, advising and investing roles in an attempt to satisfy Rule 10b-5(a) and (c) does not change that result. (Opp. at 37).

First, CSFB cannot be liable for its conduct under Section 10(b) because, unlike the defendants in the "fraudulent scheme" cases relied upon by Plaintiffs (Opp. at 33-37), CSFB had no duty of disclosure to Plaintiffs. See Chiarella, 445 U.S. at 235 (holding that

"a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information"); In re Towers, 1995 WL 571888, at *16 (in a nondisclosure case, "the plaintiff must show that the defendant had some fiduciary duty running to the plaintiff"). Plaintiffs' attempt to get around this deficiency by alleging that CSFB "knew that Enron was falsifying its publicly reported financial results and that its true financial condition was much more precarious than was publicly known" and that CSFB "obtained this knowledge due to its unlimited access to Enron's internal business and financial information as Enron's lead lending bank, as well as its intimate interaction with Enron's top officials" is to no avail. (Compl. ¶ 713.) Those conclusory allegations do not impose on CSFB any duty to disclose its dealings with Enron or to ensure the accuracy of Enron's financial statements. As the Supreme Court has stated, there is no "general duty between all participants in market transactions to forgo actions based on material, nonpublic information" but rather a duty "arises from a specific relationship between two parties". Chiarella, 445 U.S. at 233. Absent such duty--and Plaintiffs have pleaded none with respect to CSFB--CSFB cannot be liable for a "scheme to defraud".

Second, regardless of the statutory buzzwords used by Plaintiffs, the allegations against CSFB are nothing more than disguised claims of aiding and abetting or conspiracy that cannot form the basis for liability after Central Bank. (See supra Part III.A.1.) Indeed, Plaintiffs allege that CSFB "knowingly engaged and participated in and, in furtherance of the scheme, helped Enron" (Compl. ¶ 707)--the very elements of pre-Central Bank aiding and abetting liability. See IIT v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980) (finding aiding and abetting liability under Section 10(b)); Wright, 152 F.3d at 176 (observing that "secondary actors" may "no longer be held primarily liable under § 10(b) for mere knowledge and assistance"); see also Zishka, 2000 WL 1310529, at *5 (dismissing Section 10(b) allegations that "sound to the Court like aiding and abetting"); Askin, 1996 WL 494904, at *7 (dismissing allegations which, "at their core, still

constitute, at most, aiding and abetting"). Similarly, CSFB cannot be liable simply because Plaintiffs label the alleged concerted fraudulent activity a "scheme to defraud" rather than a "conspiracy". See Scone Invs., 1998 WL 205338, at *6; In re Silicon Graphics, Inc. Sec. Litig., 970 F. Supp. 746, 762 (N.D. Cal. 1997) (dismissing "scheme" allegations as nothing more than a "thinly disguised attempt to avoid the impact of the Central Bank decision") (citation omitted). To hold otherwise would elevate the wording of Plaintiffs' allegations over their substance and would permit plaintiffs to circumvent the clear holding of Central Bank.

Third, Plaintiffs' Rule 10b-5(a) and (c) claims must fail because Plaintiffs have not stated with particularity the role of CSFB in any alleged scheme to defraud. To state a claim under Rule 10b-5(a) or (c), Plaintiffs must allege "all of the established elements of a 10b-5" claim, including "misrepresentation and scienter". In re Towers, 1995 WL 571888, at *16 (dismissing "scheme" allegations as insufficient to state a claim under Section 10(b)). As demonstrated elsewhere, Plaintiffs have failed to identify any actionable misstatements made by CSFB, and they have failed to plead scienter. (See supra Part III.A.2; infra Part III.B; CSFB Mem. at 10-17.) See Lemmer, 2001 WL 1112577, at *8 (dismissing "scheme" allegations where plaintiff "has failed to allege specific misrepresentations").

Nor does the Complaint provide any detail whatsoever of CSFB's alleged role in the fraudulent scheme; instead it merely repeats its conclusion that CSFB "actively participated in the Enron fraudulent scheme". (Compl. ¶ 712; see also id. ¶¶ 702, 703, 705, 712, 714.) "Allowing such general, unsupported allegations of a fraudulent scheme, without any details that support a strong inference of such a scheme such as acts of participation by each of the Defendants would vitiate the particularity requirements of the PSLRA." Lemmer, 2001 WL 1112577, at *8 (observing that "[t]his approach is precluded for the same reasons that the group pleading doctrine is precluded"); see also

Pegasus Holdings v. Veterinary Ctrs. of Am., Inc., 38 F. Supp. 2d 1158, 1164 (C.D. Cal. 1998) (allegations of "stock ownership and attendance at certain meetings is not enough to establish a functional relationship to a fraudulent scheme" because plaintiffs must "provide examples of particular actions (or omissions) on the part of the non-speaking defendants" to satisfy the PSLRA); Askin, 1996 WL 494904, at *7 (allegations that a broker "created, supplied and financed" the purchases of securities later sold by another defendant to investors insufficient because "while a substantial, integral role is necessary to primary liability under Section 10(b) and Rule 10b-5, it is not sufficient"). Absent particularized allegations of CSFB's purportedly deceptive conduct--as opposed to legitimate investment banking functions--CSFB cannot be liable as a primary violator.

B. Plaintiffs Have Failed Adequately To Allege Scienter.

All of Plaintiffs' Section 10(b) claims also fail for the separate and equally dispositive reason that Plaintiffs have inadequately pleaded scienter against CSFB.

As an initial matter, Plaintiffs misstate the law in this Circuit regarding scienter, failing even to cite the Fifth Circuit's most recent discussion of scienter in Abrams v. Baker Hughes Inc., No. 01-20514, 2002 WL 1018944 (5th Cir. May 21, 2002). In Abrams, the Fifth Circuit reaffirmed that "[a]llegations of motive and opportunity, standing alone, are no longer sufficient to plead a strong inference of scienter". Id. at *4 (reaffirming the standard set forth in Nathenson v. Zonagen Inc., 267 F.3d 400, 419-20 (5th Cir. 2001)). As shown below, Plaintiffs--relying on a single case from a different circuit where "motive and opportunity" is sufficient--offer nothing more.

In addition, Plaintiffs' assertion that mere "[r]ecklessness satisfies the scienter requirement" is likewise wrong. (Opp. at 100.) Under Fifth Circuit law, Plaintiffs must make a showing of at least "severe recklessness", which is "limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standard of ordinary care, and

that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." Abrams, 2002 WL 1018944, at *4 (citation and internal quotation marks omitted). Plaintiffs simply have not--and cannot--demonstrate that their allegations against CSFB satisfy these standards.

1. Plaintiffs have failed to plead scienter adequately with respect to their "scheme to defraud" claims.

Plaintiffs attempt to remedy their failure to plead scienter by repeating their conclusory state of mind allegations regarding CSFB's alleged participation in a "scheme to defraud".[16] Plaintiffs assert, for example, that:

- CSFB must have known about Enron's fraudulent scheme because of their "extensive and extremely close relationship" and "could not have" participated in that scheme "as a result of negligence or ignorance" (Opp. at 97, 104; see also Compl. ¶ 713);
- "the proceeds of Enron's securities offerings underwritten by CS First Boston . . . were utilized to repay Enron's existing commercial paper and bank indebtedness, including indebtedness to CS First Boston" (Opp. at 115; see also Compl. ¶ 702);
- "CS First Boston was pocketing millions of dollars a year in interest payments, syndication fees and investment banking fees" (Opp. at 115; see also Compl. ¶¶ 693, 702);
- CSFB "acted as an underwriter in eight securities offerings" (Opp. at 111; see also Compl. ¶ 696);
- "[t]op executives of CS First Boston were also permitted to personally invest $22.5 million in Enron's lucrative LJM2 partnership" (Opp. at 98; see also Compl. ¶ 712).

As we showed in our opening memorandum (CSFB Mem. at 14-17), such allegations--which are nothing more than vague inferences of CSFB's purported motive and opportunity--are insufficient to plead scienter. See Abrams, 2002 WL 1018944, at *4;

---

[16] The opposition purports to offer as new "bases" for inferring scienter recent newspaper articles and congressional testimony. (Opp. at 105-06.) Those new "allegations" are not only insufficient, they are nowhere pleaded in the Complaint. (See supra Part I.)

Nathenson, 267 F.3d at 419-20; In re BMC Software, 183 F. Supp. 2d at 885.

Moreover, Plaintiffs' suggestion that the conduct alleged in their "scheme to defraud" theory somehow satisfies their pleading burden with respect to scienter is not supported by the law (and, notably, Plaintiffs do not cite any). (Opp. at 99, 104.) To the contrary, the PSLRA requires--without exception--that Plaintiffs "shall, with respect to each act or omission alleged . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). Plaintiffs cannot satisfy this pleading requirement by merely labeling the conduct a "scheme to defraud". Nor does any of the conduct in which CSFB is alleged to have participated give rise to a strong inference of scienter or demonstrate that CSFB knew that Enron was misrepresenting its financial condition with respect to these transactions. For example:

- Plaintiffs allege that CSFB's disclosed commercial loans to Enron somehow give rise to the requisite scienter. (Opp. at 109-10.) Plaintiffs apparently rely on paragraph 650 of the Complaint--a paragraph that does not mention CSFB--which generally alleges that "banks are required to perform extensive credit analysis of the borrower" and concludes that therefore "each of the banks named as defendants obtained . . . extremely detailed information concerning the actual financial condition of Enron . . . and was aware that the actual condition of Enron's business . . . was far worse than was being publicly disclosed". (Compl. ¶ 650.) There are no specific factual allegations that CSFB did receive information about the actual financial condition of Enron in connection with any loans or that CSFB knew from that information that the condition of Enron's business was worse than was being reported.

- Plaintiffs allege that CSFB and Enron engaged in "phony loan transactions" "to conceal loans to Enron and allow Enron to boost its reported results". (Opp. at 104; see also Compl. ¶¶ 45, 567, 706.) But Plaintiffs do not allege that anyone at CSFB knew that Enron was improperly accounting for the transaction, much less plead facts suggesting that someone at CSFB actually knew that Enron was misrepresenting its financial condition. In fact, as Plaintiffs themselves point out, CSFB "booked the transaction as a loan". (Compl. ¶¶ 45, 567, 706.)

- Plaintiffs allege that "bankers at CS First Boston, including Lawrence Nath, structured the Raptors and knew that the Raptors hid a great deal of Enron's debt from investors . . . . Thus, CS First Boston knew that Enron's

> reported financial condition was not its real financial condition." (Opp. at 108 n.55; see also Compl. ¶¶ 707-711.) Even if CSFB bankers structured the Raptors (which is not the case), alleging that CSFB structured transactions does not support the inference that CSFB therefore knew that Enron was improperly accounting for the transactions and misrepresenting its financial condition.

These "must have known of the fraud" allegations are perfect examples of conclusory, "fraud by hindsight" allegations of the type this Court has previously rejected.[17] See In re BMC Software, 183 F. Supp. 2d at 887.

In re Livent, Inc. Noteholders Sec. Litig., 174 F. Supp. 2d 144 (S.D.N.Y. 2001)--the sole case relied upon by Plaintiffs--is not to the contrary. (Opp. at 106.) In fact, Livent (a case decided under Second Circuit law, which--unlike the law in this Circuit--permits scienter to be alleged solely based on motive and opportunity, see id. at 149) only serves to highlight the inadequacy of the facts alleged here. In that case, Livent and CIBC entered into an agreement that "involved what publicly was purported to be a bona fide investment providing for CIBC's purchase of production and royalty rights in certain Livent shows in exchange for a fee of $4.6 million (Can.) characterized in the agreement as non-refundable". Id. at 147. However, the parties also signed a "secret side letter" that "contradicted the investment agreement and required Livent to repurchase within six months the production rights . . . for an amount corresponding to the same $4.6 million, plus substantial interest."[18] Id. Here, there are no allegations that CSFB and Enron

---

[17] Both the Complaint and the opposition are replete with other examples of conclusory, unsupported scienter allegations. (See, e.g., Compl. ¶ 713 ("CS First Boston knew that Enron was falsifying its publicly reported financial results"); Opp. at 97 (CSFB "directly participated in the falsification of Enron's true financial condition"); Opp. at 98 (CSFB "helped structure and fund several of Enron's secretly controlled partnerships . . . which falsified Enron's financial statements").) Such "conclusory allegations of state of mind" have routinely been rejected under the PSLRA's heightened pleading standard. See Nathenson, 267 F.3d at 419-20; Kurtzman, slip op. at 93; In re Azurix Corp. Sec. Litig., No. H-00-4034, 2002 WL 562819, at *23 (S.D. Tex. Mar. 21, 2002). Plaintiffs' allegations fail to satisfy the scienter pleading requirements for the same reasons.

[18] Notably, the Livent court initially dismissed the plaintiffs' claims regarding these secret agreements for failure to plead scienter adequately, and only allowed the claim to

entered into a "secret side agreement". Indeed, Plaintiffs' discussion of Livent focuses solely on the acts of another defendant, mentioning CSFB only in a footnote. (Opp. at 108 & n.55.)

2. Plaintiffs have failed to plead scienter adequately with respect to the alleged analyst statements.

Plaintiffs have similarly failed to allege the requisite scienter with respect to their claims premised on CSFB analyst statements. Because the analyst statements are forward-looking statements, the PSLRA requires an even stricter level of scienter--"actual knowledge" of their false and misleading nature. 15 U.S.C. §§ 78u-5(c)(1)(B)(i)-(ii). Plaintiffs do not come close to meeting this standard for at least three reasons.

First, the Complaint contains no specific allegations that any of the CSFB analysts actually knew that their statements were false or misleading.[19] See Fellman v. Electro Optical Sys. Corp., No. 98 Civ. 6403, 2000 WL 489713, at *5 (S.D.N.Y. Apr. 25, 2000) (dismissing Section 10(b) claims based on research reports for failure to meet the heightened pleading requirement). (See also CSFB Mem. at 18.) Instead, Plaintiffs rely entirely on their conclusory allegation that CSFB functioned as a "unified entity" and did not observe any "Chinese Wall". (Opp. at 112; Compl. ¶ 695.) As shown in CSFB's opening memorandum, however, such unsupported allegations cannot meet the PSLRA's

---

go forward after the plaintiffs amended their complaint to include allegations of a "sufficient link between CIBC's alleged awareness of and participation in Livent's fraudulent scheme, and an actual public misrepresentation made by or attributed to CIBC in connection with the purchase or sale of securities on the basis of which [plaintiffs] made their investment decision." Livent, 174 F. Supp. 2d at 150 (emphasis added).

[19] McNamara v. Bre-X Minerals Ltd., 5:97-CV-159, 2001 U.S. Dist. LEXIS 4571 (E.D. Tex. Mar. 30, 2001), a case cited by Plaintiffs, is instructive about the type of scienter allegations that will suffice to state a Section 10(b) claim based on analyst statements. In that case, the plaintiffs alleged "specific detail" about: (i) what information the defendant J.P. Morgan had about Bre-X; (ii) the significance of that information "in light of all the information available"; (iii) "who at J.P. Morgan received the information"; and (iv) "when it was received." Id. at *166 n.30. Plaintiffs, by contrast, have alleged no such details here.

heightened pleading requirement.[20] (CSFB Mem. at 18-19.)

Second, Plaintiffs' argument that the analysts' scienter may be established by an "imputation" of all knowledge allegedly possessed by CSFB is wrong as a matter of law. (Opp. at 112-13.) Plaintiffs cite no cases that support the application of this "imputation" theory to Section 10(b) claims, and ignore the fact that a "collective knowledge" theory of liability would directly contravene the PSLRA. Instead, Plaintiffs rely on inapposite cases decided in other contexts--none of which is subject to the PSLRA's heightened pleading standards for scienter.[21] Furthermore, even if the "imputation" theory were legally sound--and it is not--it would fail for the additional reason that Plaintiffs have failed to meet the scienter requirements with respect to CSFB generally (see supra Part III.B.1) as well as with respect to CSFB's analysts specifically.

Third, Plaintiffs have failed to plead facts that give rise to an inference that each

---

[20] To the extent Cooper v. Pickett, 137 F.3d 616, 628 (9th Cir. 1997), is read to permit such vague scienter allegations, it is inconsistent with the express requirements of the PSLRA and with the applicable law in this Circuit. Indeed, Cooper itself was decided under pre-PSLRA law, which permitted scienter to be pleaded "generally". Cooper, 137 F.3d at 628 & n.2 (noting that the heightened pleading requirements of the PSLRA "do[] not apply to any action [such as Cooper] commenced before and pending on December 22, 1995").

[21] See Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962) (criminal prosecution of a corporation based on an employee's conduct under the Connally Hot Oil Act) (cited in Opp. at 112-13); Am. Standard Credit, Inc. v. Nat'l Cement Co., 643 F.2d 248 (5th Cir. 1981) (discussing whether the knowledge of one of the parties to a joint venture will be imputed to the joint venture for purposes of determining whether a party is a buyer in ordinary course under the UCC) (cited in Opp. at 112); Hellenic Inc. v. Bridgeline Gas Distrib. LLC, 252 F.3d 391 (5th Cir. 2001) (addressing whether an employee's "position in the corporate hierarchy was sufficiently elevated" to hold the employer responsible for his actions under the Limited Liability Act) (cited in Opp. at 113); United States v. Bank of New England, 821 F.2d 844 (1st Cir. 1987) (addressing whether it is proper to consider a bank's knowledge in the aggregate for purposes of criminal liability under the Currency Transaction Reporting Act) (cited in Opp. at 114); Burzynski v. Aetna Life Ins. Co., Civ. No. H-89-3976, 1992 U.S. Dist. LEXIS 21300 (S.D. Tex. Mar. 31, 1992) (considering whether an agent's knowledge may be imputed to the corporation for purposes of RICO liability) (cited in Opp. at 114); United States v. Wilshire Oil Co., 427 F.2d 969 (10th Cir. 1970) (addressing whether knowledge of a corporation will be imputed to a successor corporation after a merger for purposes of criminal liability under the Sherman Act) (cited in Opp. at 114-15).

allegedly misleading statement was made with the requisite scienter. See Holmes v. Baker, 166 F. Supp. 2d 1362, 1376 (S.D. Fla. 2001). As noted in CSFB's opening memorandum--and as Plaintiffs do not dispute in their opposition--Plaintiffs' single conclusory scienter allegation is insufficient to cover 18 separate analyst reports issued by six different analysts on 18 different dates. (CSFB Mem. at 20.)

IV. THE COMPLAINT FAILS TO STATE A CLAIM FOR CONTROL PERSON LIABILITY AGAINST CSFB.

Plaintiffs do not mention, let alone respond to, CSFB's argument that they have failed to state a claim against CSFB for control person liability. Thus, as Plaintiffs apparently concede, the Section 20(a) claim against CSFB should be dismissed as a matter of law. (See CSFB Mem. at 21-23.)

Conclusion

For the foregoing reasons and the reasons set forth in CSFB's opening memorandum, the Court should dismiss the Complaint in its entirety as against CSFB.

Dated: June 24, 2002

Respectfully submitted,

Lawrence D. Finder
Southern Dist. Id. No. 602
Texas Bar No. 07007200
HAYNES AND BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, TX 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

ATTORNEY-IN-CHARGE FOR CREDIT SUISSE FIRST BOSTON CORP.

OF COUNSEL:

Richard W. Clary
Julie A. North
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
Telephone: (212) 474-1000
Telecopier: (212) 474-3700

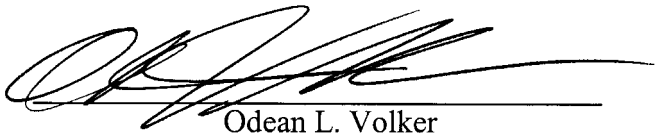
George W. Bramblett, Jr.
Southern Dist. Id No. 10132
Texas Bar No. 02867000
Noel M.B. Hensley
Southern Dist. Id. No. 10125
Texas Bar No. 09491400
HAYNES AND BOONE, LLP
901 Main Street, Suite 3100
Dallas, TX 75202-3789
Telephone: (214) 651-5000
Telecopier: (214) 651-5940

Odean L. Volker
Southern Dist. Id. No. 12685
Texas Bar No. 20607715
HAYNES AND BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, TX 77002-5012
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

ATTORNEYS FOR CREDIT SUISSE FIRST BOSTON CORP.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record for all parties to the above cause (identified on the Service List attached hereto) in accordance with the Court's order entitled "Order Regarding Service of Papers and Notice of Hearings" on the 24th day of June, 2002.



Odean L. Volker